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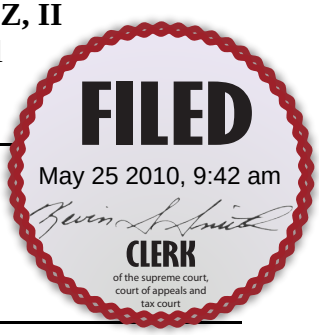

IN THE COURT OF APPEALS OF INDIANA

TIMOTHY BITTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 24A01-0908-CR-382
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0807-FA-306

May 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Timothy Bitter appeals his conviction and sentence for child molesting as a Class C felony. We reverse and remand.

Issue

Bitter raises four issues. We find one issue dispositive and restate that issue as whether fundamental error occurred when the trial court instructed the jury after it indicated it was unable to reach a decision. Additionally, because the issue may arise on remand, we also address Bitter's argument that fundamental error occurred by the admission of evidence under the Indiana Protected Persons Statute, Indiana Code Section 35-37-4-6.

Facts

Bitter was married to Nancy Bitter, and they often babysat Nancy's two grandchildren, four-year-old J.K. and eleven-month-old I.K. Jamie K., Nancy's son, and Tiffany K. are the parents of J.K. and I.K.

On April 5, 2008, J.K. was at Bitter's residence after spending the night there. Tiffany called and told Bitter that she was on her way to pick up J.K. When Tiffany arrived, she looked through the glass-paned door and saw Bitter and J.K. playing a game. Bitter was repeatedly handing a toy to J.K., who would put the toy down her pajama pants so that it would fall out of the pant leg. Tiffany knocked on the door, thanked and hugged Bitter, and left with J.K.

That night, Tiffany saw that J.K. had her hands in her pants and told J.K. to "cut it out." Tr. p. 61. J.K. started to giggle, and Tiffany asked, "you think that's funny?" Id. J.K. started to be withdrawn, and Tiffany asked, "does anyone else think that's funny?" Id. at 62. J.K. responded that "grandpa" thought it was funny and "tells [her] to do that." Id. J.K. said Bitter called it the "who-ha" game and said that Bitter "puts his hands in his pants and he squeezes it." Id. J.K. said that they played the game in the computer room while Nancy was in the kitchen. Tiffany carried J.K., who was fighting her, into the living room. Tiffany turned on their video camera and asked J.K. questions about the alleged molestation. Later that evening, J.K. told Tiffany that Bitter "said he would hurt [Tiffany] if [J.K.] told." Id. at 68.

On Monday, April 7, 2008, Tiffany took J.K. to her pediatrician, Dr. Elisabeth Kelley, who examined J.K. Dr. Kelley found no evidence of trauma and referred J.K. to the Mayerson Clinic at the Cincinnati Children's Hospital. At the Mayerson Clinic, Tasha McGuire conducted a forensic interview of J.K. J.K. denied that anyone had touched her inappropriately. McGuire recommended that J.K. receive counseling.

On Wednesday, April 9, 2008, Tiffany's sister, Kara P., and her son visited. While J.K. and her cousin played during the visit, J.K. told him to pull down his pants. When questioned by Tiffany and her sister as to why she told her cousin to pull down his pants, J.K. said that "Grandpa" did that. Id. at 88. J.K. said that Bitter "puts his hands in his pants" and that she also put her hands in her pants. Id. J.K. also said that Bitter had touched her sister, I.K., by touching I.K.'s bottom and putting his mouth on I.K.'s bottom and kissing it. Although she initially denied that Bitter had kissed her bottom, when

Tiffany and Kara continued to question J.K., she said that Bitter had also kissed her bottom.

In June 2008, J.K. told Tiffany that Bitter "did it to [I.K.] a lot." Id. at 97. Tiffany called Kristen Obermeyer, a Department of Child Services family case manager, and Obermeyer immediately came over to talk to J.K. J.K. told Obermeyer and Tiffany that Bitter had touched I.K.'s bottom with his finger and kissed I.K.'s vagina and that he kissed J.K.'s breasts. Tiffany videotaped the conversation.

In June or July 2008, J.K. told Jamie that she was scared "because she told something she shouldn't have and . . . she was afraid [Bitter] was going to come and get her." Id. at 330.

Dr. Linda Ronald, a psychologist, treated J.K. J.K. told Dr. Ronald that she was upset with Tiffany "talking about what had happened." Id. at 482. J.K. also told Dr. Ronald that Bitter had "stuck his finger in her privates" and that Bitter had touched I.K. Id. at 500.

The State charged Bitter with: (1) Count I, Class A felony child molesting for placing his mouth on J.K.'s vagina; (2) Count II, Class C felony child molesting for fondling or touching J.K. or himself with the intent to arouse or to satisfy his sexual desires; (3) Count III, Class A felony child molesting for placing his mouth on I.K.'s vagina; and (4) Count IV, Class C felony child molesting for fondling or touching I.K. or himself with the intent to arouse or to satisfy his sexual desires.

The State filed a motion to introduce child hearsay evidence. The State sought to have J.K. declared unavailable to testify and introduce evidence regarding her statements

to Tiffany, Jamie, Kara, Kara's son, and Obermeyer. At the protected person hearing, J.K. testified, and the trial court ruled that "J.K. has fully demonstrated her ability to reasonably communicate in the presence of the defendant without exhibiting signs of serious emotional distress." App. p. 66. The trial court then denied the State's request to present child hearsay evidence. The State filed a motion to correct error, arguing that J.K.'s statements were admissible if reliable and asking the trial court to hold another hearing. The trial court held another hearing and found that J.K.'s statements to Tiffany had "some indicia of reliability" and were admissible. Id. at 75. The trial court also found that J.K.'s statements to Jamie were admissible and that J.K.'s statements to Kara in April 2008 were admissible "even though essentially characterized as responses given to [Kara] after many direct questions to [J.K.] by [Kara]." Id. at 76.

At the jury trial, Tiffany testified at length regarding J.K.'s statements to her on April 5, 2008, J.K.'s statements to her and Kara on April 9, 2008, and J.K.'s statements to her and Obermeyer in June 2008. The jury was shown the videotape of J.K.'s statements to Tiffany and the videotape of J.K.'s statements to Tiffany and Obermeyer. J.K. then testified that Bitter touched her "butt" and I.K.'s "butt," and she pointed "to the front and the back." Tr. p. 210. She also said that Bitter kissed and poked between I.K.'s legs. Next, Obermeyer, Jamie, Kara, and Dr. Ronald each testified regarding J.K.'s statements to them. Bitter did not object to the testimony regarding J.K.'s statements.

Bitter testified and denied touching J.K. or I.K. inappropriately. Bitter also presented the testimony of Dr. Phillip Esplin, an expert in forensic psychology. Dr. Esplin reviewed the videotaped interviews with J.K., the depositions, therapy records,

police and social services records, and court testimony. He was concerned about the suggestive nature of some of the questioning of J.K. and the multiple interviews of J.K.

The jury started deliberating at 3:30 p.m. on March 11, 2009. At approximately midnight, the jury sent a note stating:

> This jury is unable to reach a verdict for Count I, II, III, & IV.
>
> We have had much discussion and are unable to come to an agreement without surrend[er]ing our honest convictions as to the weight or effect of evidence solely because of the opinion of our fellow jurors, or for the mere purpose of returning a verdict.

App. p. 105. The trial court then brought the jury into the courtroom and instructed them as follows:

> The Court would indicate to the jury though for purposes of the record that we are early in deliberations. Uh, it is, uh, uh, not the opinion of the Court that there is another jury that could be picked in the citizenry that are any better or better equipped to come to this, uh, verdict than those which have been empanelled. Uh, that it is your duty to, uh, continue to deliberate until you can all come to an agreement one way or the other. That, uh, the process has been fulfilled, uh, by all of those, uh, persons who are in the courtroom who have, um, come here to present, uh, their sides of the dispute. Uh, the State has, the Defense has, uh, and now this, uh, obligation rests with the jury. And, uh, uh, it is your obligation to, uh, again, mull over this evidence, this information, uh. It is why you are here. It is your duty. It is your job. And, uh, there's a lot of information. There's a lot of evidence. Uh, the jury has been out basically since about 3:30, 3:35 and, uh, if you are telling me that you feel at this time that you are unable, uh, to agree then you've got more discussion with each other to see about how you can reach an agreement. So with that said, uh, you need to return to the jury room and continue your deliberations until, uh, you have fulfilled your obligation with regard to this matter. Thank you.

Tr. p. 743-44. At approximately 3:30 a.m., the jury found Bitter guilty of Count II, child molesting as a class C felony as to J.K., and not guilty of the remaining charges.

On May 6, 2009, Bitter filed a motion to correct error regarding the trial court's instruction to the jury during deliberations and arguing that the jury's decision was a compromise verdict. With the motion to correct error, Bitter filed affidavits from a juror and from his trial counsel. On June 29, 2009, Bitter filed a notice of appeal. On June 30, 2009, after the motion to correct error had been deemed denied pursuant to Indiana Trial Rule 53.3, the trial court entered an order denying the motion to correct error. In the order, the trial court noted that Bitter's counsel did not object and agreed "that the Court would bring the panel back into open court and instruct them in the manner in which it did." App. p. 125. Bitter now appeals.

Analysis

I. Allen Charge

Bitter argues that the trial court's instruction to the jury during deliberations resulted in fundamental error. In response, the State argues that Bitter invited any error because his trial counsel agreed to the instruction.

We begin by addressing the State's invited error argument. The discussion between the attorneys and the trial court regarding the jury's note during deliberations was not recorded and is not in the transcript. The only mention of Bitter's counsel agreeing to the instruction given by the trial court is in the prosecutor's affidavit submitted in response to Bitter's motion to correct error and in the trial court's order on

Bitter's motion to correct error.[1] However, the order denying Bitter's motion was entered after the motion had been deemed denied pursuant to Indiana Trial Rule 53.3 and Bitter had filed a notice of appeal. Moreover, without the transcript of the conversation, we have no way to determine if Bitter's counsel agreed to the exact instruction that was given. Although the State could have filed a statement of evidence pursuant to Indiana Appellate Rule 31 and given more detail on the alleged invited error, it did not do so. Under these circumstances, we decline to hold that Bitter invited the error.

Although Bitter failed to object to the trial court's instruction, he argues that fundamental error occurred. "Because the best way to assure a fair trial is to resolve potential errors while the trial is under way, we generally hold that a claim of error must be raised during trial in order to be available as an issue on appeal." Clark v. State, 915 N.E.2d 126, 131 (Ind. 2009). "We nevertheless sometimes entertain such claims under the rubric of 'fundamental error.'" Id. "Fundamental error is an error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." Id. "Fundamental error applies only when the actual or potential harm 'cannot be denied.'" Id. (quoting Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002)).

Bitter argues that the trial court's instruction constituted an "Allen charge." The term "Allen charge" is a "designation given to a supplemental charge given by a trial

[1] The prosecutor's affidavit noted that Bitter's counsel "concurred that the jury should continue to deliberate in order to reach a unanimous verdict." App. p. 121. The trial court's order provided: "It was agreed that the Court would bring the panel back into open court and instruct them in the manner in which it did." Id. at 125.

judge to an apparently deadlocked jury, [and] is named after the first major case which considered such a charge," Allen v. United States, 164 U.S. 492, 17 S. Ct. 154 (1896). Lewis v. State, 424 N.E.2d 107, 109 (Ind. 1981). "Although the content of these instructions has varied throughout the years from the substance of the instruction considered in Allen v. United States, they are still referred to generally as the 'Allen charge.'" Id.

> The question involved is whether the trial judge abused his discretion by unduly commenting on, or giving emphasis to, certain matters of evidence by mandating a jury to act and deliberate in a certain manner or by intimidating the minority jurors into voting with the majority in order to reach a conclusion of the case, even though they might feel inclined to decide the case otherwise.

Id.

In the past, our supreme court has held that "the proper procedure when the jury is apparently deadlocked is for the trial court to call the jury back into open court in the presence of all parties and their counsel and reread all instructions given to them prior to their deliberations, without emphasis on any of them and without further comment." Bailey v. State, 669 N.E.2d 972, 972 (Ind. 1996). However, on December 21, 2001, the court adopted Indiana Jury Rule 28, which went into effect on January 1, 2003. The rule provides:

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with

> counsel, may direct that further proceedings occur as appropriate.

Ind. Jury Rule 28.

The rule was "adopted to afford trial courts greater flexibility in dealing with jury impasses." Henri v. Curto, 908 N.E.2d 196, 205 (Ind. 2009) (citing Ronco v. State, 862 N.E.2d 257 (Ind. 2007)). "Before Rule 28, a trial court was required to reread all instructions in response to a jury question." Id. With the adoption of Rule 28, our supreme court "intended to encourage trial judges to fashion creative, resourceful, and sensible responses to individualized case circumstances to assist jurors confronted with apparent impasse." Id. However, judicial resort to Rule 28 techniques is not mandatory. The rule merely "confers discretionary authority." Id. (quoting Ronco, 862 N.E.2d at 260). Although Jury Rule 28 gives a trial court more flexibility in dealing with a jury at an impasse, the Rule does not authorize the giving of an Allen charge in response to a jury's impasse.

Here, when the jury indicated that it was deadlocked, the trial court followed neither Jury Rule 28 nor the pre-Rule 28 requirement of rereading the instructions. Although the jury had been deliberating for more than eight hours, the trial court informed the jury that they were "early in deliberations" and that another jury would not be better equipped to come to a verdict. Tr. p. 744. The trial court told the jury that the jury had the duty to "continue to deliberate until you can all come to an agreement one way or the other." Id. The trial court continued by saying:

> [I]f you are telling me that you feel at this time that you are unable, uh, to agree then you've got more discussion with

> each other to see about how you can reach an agreement. So with that said, uh, you need to return to the jury room and continue your deliberations until, uh, you have fulfilled your obligation with regard to this matter.

Id. The clear intent of the instruction was to procure a verdict from an otherwise deadlocked jury. See Mosley v. State, 660 N.E.2d 589, 591 (Ind. Ct. App. 1996) (holding that a supplemental instruction given after the jury indicated that it was deadlocked was reversible error).

The danger in such an instruction is in "intimidating the minority jurors into voting with the majority in order to reach a conclusion of the case, even though they might feel inclined to decide the case otherwise" and encouraging a compromise verdict. Lewis, 424 N.E.2d at 109. Bitter contends that the jury's guilty verdict on one Class C child molesting charge despite the not guilty verdicts on the other charges was a compromise verdict.[2] Given the instruction and the circumstances surrounding the trial, we agree that the potential for a compromise verdict was high.

[2] With his motion to correct error, Bitter submitted a juror affidavit regarding deliberations after the trial court's instruction. Although not mentioned by the State, we note that Indiana Evidence Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

The jury trial started on March 9, 2009. The first day of trial started at 8:30 a.m. and ended at 8:30 p.m. The second day of trial, March 10, 2009, started at 8:00 a.m. and ended at approximately 8:30 p.m. On the third day of trial, March 11, 2009, the proceedings started at 8:00 a.m., and the jury started deliberating at 3:30 p.m. The jury had much evidence to consider, including the effect of multiple interviews on J.K. and the effect of repeated leading questioning of J.K. during the interviews. At midnight, the jury informed the trial court that it was at an impasse. The trial court effectively instructed the jury to continue deliberating until it reached a unanimous verdict. After another three hours, at 3:00 a.m., the jury returned a guilty verdict on one of the Class C felony charges and not guilty verdicts on the remaining charges.

Given the long hours, the evidence presented at trial, and the language of instruction to the jury during deliberations, the potential for harm as a result of the instruction is undeniable. We conclude that the Allen charge instruction resulted in fundamental error, and we reverse Bitter's conviction. Cf. Parish v. State, 838 N.E.2d 495 (Ind. Ct. App. 2005) (holding that trial counsel's failure to object to a pre-deliberation Allen charge was deficient performance and resulted in prejudice and remanding for a new trial due to ineffective assistance of counsel).

"A defendant who succeeds in having his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction may be retried so long as there was sufficient evidence to support the conviction." Harris

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The juror's affidavit does not fall within one of the enumerated exceptions to Indiana Evidence Rule 606(b). Consequently, we do not consider the juror's affidavit.

v. State, 884 N.E.2d 399, 404 (Ind. Ct. App. 2008), trans. denied. Therefore, we must determine if sufficient evidence supported Bitter's conviction for Class C felony child molesting. Under our standard of review, we do not reweigh the evidence or judge the credibility of the witnesses. Id. We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. Id. We consider whether sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. Id.

The offense of Class C child molesting is governed by Indiana Code Section 35-42-4-3(b), which provides: "A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony." In Count II, the State charged Bitter with fondling or touching J.K. with the intent to arouse or satisfy his sexual desires. At the trial, J.K. testified that Bitter touched her butt, and she pointed "to the front and the back" between her legs. Tr. p. 210. We conclude that the evidence is sufficient to permit a retrial of Bitter on the Class C felony child molesting charge.

II. Protected Persons Statute

Because the issue is likely to recur on retrial, we will also address Bitter's argument regarding the admission of evidence under the Indiana Protected Persons Statute, Indiana Code Section 35-37-4-6. Bitter argues that the trial court's admission of J.K.'s statements to Tiffany on April 5, 2008, to Tiffany and Kara on April 8, 2008, and to Tiffany and Obermeyer in June 2008 resulted in fundamental error. Bitter contends

that the statements were unreliable and inadmissible under Indiana Code Section 35-37-4-6.

Indiana Code Section 35-37-4-6, the Protected Persons Statute, provides, in part:

> (c) As used in this section, "protected person" means:
>
> (1) a child who is less than fourteen (14) years of age;
>
> * * * * *
>
> (d) A statement or videotape that:
>
> (1) is made by a person who at the time of trial is a protected person;
>
> (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
>
> (3) is not otherwise admissible in evidence;
>
> is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.
>
> (e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
>
> (1) The court finds, in a hearing:
>
> (A) conducted outside the presence of the jury; and
>
> (B) attended by the protected person;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.

(ii) The protected person cannot participate in the trial for medical reasons.

(iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

(f) If a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:

(1) at the hearing described in subsection (e)(1); or

(2) when the statement or videotape was made.

* * * * *

> (h) If a statement or videotape is admitted in evidence under this section, the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement or videotape and that, in making that determination, the jury shall consider the following:
>
> (1) The mental and physical age of the person making the statement or videotape.
>
> (2) The nature of the statement or videotape.
>
> (3) The circumstances under which the statement or videotape was made.
>
> (4) Other relevant factors.

* * * * *

For several reasons, we have considerable concern regarding the admission of J.K.'s hearsay statements. After the protected persons hearing, the trial court ruled that the statements to Tiffany had "some indicia of reliability." App. p. 75. The trial court did not find that J.K.'s statements to Kara in April 2008 were reliable and, in fact, expressed concern over the manner of questioning, but still ruled that the statements were admissible. For the statements to be admissible, the Protected Persons Statute requires that the trial court determine that "the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability." I.C. § 35-37-4-6(e)(1).

Further, the State presented multiple witnesses, including Tiffany, Jamie, Kara, Obermeyer, and Dr. Ronald, to testify regarding J.K.'s statements to them. Although Bitter did not object to the evidence, this drumbeat repetition of J.K.'s claims is exactly

the type of evidence that our supreme court expressed concern about in Modesitt v. State, 578 N.E.2d 649 (Ind. 1991). See also Stone v. State, 536 N.E.2d 534 (Ind. Ct. App. 1989) (holding that the defendant was prejudiced by the drumbeat admission of the victim's claims seven times), trans. denied.

Finally, we note that if Bitter is retried on the Class C felony child molesting charge, our supreme court's opinion in Tyler v. State, 903 N.E.2d 463 (Ind. 2009), will be applicable. In Tyler, our supreme court exercised its supervisory powers and held that, despite the language of the Protected Persons Statute providing otherwise, "a party may not introduce testimony via the Protected Person Statute if the same person testifies in open court as to the same matters." Tyler, 903 N.E.2d at 465. The Tyler holding is "not applicable to proceedings conducted prior to [its] publication" on March 31, 2009. Id. at 467. Bitter's first trial was held on March 9, 2009 through March 12, 2009, and Tyler was inapplicable to it. However, Tyler will apply to any retrial. Thus, if J.K. testifies at the retrial, her hearsay statements are inadmissible under Tyler.

Conclusion

The trial court's instruction to the jury after it indicated it was at an impasse was an Allen charge and resulted in fundamental error. As a result, we reverse Bitter's conviction for Class C felony child molesting. Although Bitter may be retried, our supreme court's holding in Tyler regarding the Protected Persons Statute, Indiana Code Section 35-37-4-6, will apply to any retrial.

Reversed and remanded.

BAILEY, J., and MAY, J., concur.